DISCUSSION PAPER

1. TITLE

Status of Treatment Injuries

2. ISSUE

For the purposes of this discussion paper, a treatment injury is a subsequent injury that arises as a direct consequence of treatment for a compensable injury. Treatment injuries include injuries sustained at a place of treatment, as well as injuries sustained during travel to or from a place of exceptional medical treatment. Current policy of the Workers' Compensation Board ("WCB") provides that treatment injuries are compensable.[1]

At issue is how treatment injuries should be characterized. Specifically, is a treatment injury compensable because it:

(a) arises out of and in the course of the worker's employment; or

(b) is a direct consequence of the original injury, but does not itself arise out of and in the course of the worker's employment?

This issue is significant because the manner in which a treatment injury is characterized impacts the worker's right to sue the treatment provider for negligence. In particular, if the approach described in (a) above is adopted, the worker would be barred from suing a negligent treatment provider who is either a worker or an employer under the *Workers Compensation Act* ("*Act*"). If the approach described in (b) is adopted, the worker would be able to sue such a treatment provider.

3. BACKGROUND

3.1 Legislation

i. Treatment Injuries

The *Act* does not specifically address compensation for injuries sustained during treatment for a compensable work injury.

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[1] Whether compensation should be provided for an injury sustained during treatment for a work-related injury is not at issue in this discussion paper.

Section 5(1) of the *Act* is the gateway to entitlement to compensation for a work-related injury. It directs the WCB to pay compensation "where personal injury or death arising out of and in the course of employment is caused to a worker".

Sections 22, 23, 29 and 30 of the *Act* establish the manner in which the WCB must pay compensation if a permanent or temporary "disability results from a worker's injury".

ii. Injuries Arising Out Of And In The Course Of Employment

Section 96(1) of the *Act* provides the WCB with exclusive jurisdiction to determine whether a worker's injury arose out of and in the course of employment. As noted above, this determination is critical to establishing an injured worker's entitlement to compensation under section 5(1) of the *Act*.

The determination of whether an injury arose out of and in the course of employment is also key to establishing whether an injured worker has a right to take legal action against an employer or another worker. Specifically, section 10(1) of the *Act*, the "statutory bar", provides that compensation under the *Act* replaces the worker's right to sue any employer or worker as a result of personal injury arising out of and in the course of employment.

Where, in the course of a legal action, a question arises as to whether the statutory bar applies to prevent the action from proceeding, the court or a party to the action may ask the Workers' Compensation Appeal Tribunal ("WCAT") to determine the status of the parties under the *Act*. This application is made under section 257 of the *Act*. The WCAT determination on the status of the parties in turn determines whether the legal action can proceed.

Among the questions the WCAT considers in making a status determination is whether the worker's injury arose out of, and in the course of, the worker's employment.

3.2 Policy

Policy items #22.10 and #22.11 of the *Rehabilitation Services & Claims Manual*, Volume II ("*RS&CM*") address treatment injuries. Policy item #22.10 provides that where a further injury arises as a direct consequence of treatment for a compensable injury, the further injury is also compensable. It also provides that where a worker is undergoing treatment, the place of treatment is analogous to a place of employment. A further injury arising out of the place of treatment would be compensable.

Policy item #22.11 deals with disablement caused by surgery. It provides that where a worker undergoes surgery for a work injury, the consequences of the surgery are accepted as the consequences of the injury. Any disablement resulting from the surgery is treated as compensable.

In addition, policy item #22.15 of the *RS&CM* provides that an injury arising out of travel to or from a place of exceptional medical treatment is compensable. Travel for exceptional medical treatment includes, for instance, travel to a hospital for admittance as an in-patient or travel to an examination with a specialist physician.[2]

None of the above policies indicates the basis upon which compensation is provided for treatment injuries. In particular, it is unclear whether the treatment injury is compensable because it arose out of and in the course of the worker's employment, or whether some other rationale applies.

Policy in the *RS&CM* on treatment injuries can be traced back to Decision No. 152, a 1975 directive of the then Commissioners of the WCB.[3] Decision No. 152 outlines the circumstances under which treatment injuries are compensable. It expressly states that treatment injuries are not accepted on the grounds that they arise out of and in the course of employment. It also notes that the statutory bar to legal action might not apply to treatment injuries.

Most of Decision No. 152 has been reproduced in the current *RS&CM*, with the exception of the statements that treatment injuries do not arise out of and in the course of employment, and that the statutory bar might not apply.

In contrast with Decision No. 152, policy item #111.10 of the *RS&CM* specifically provides that where legal action is barred for a work injury, it is also barred for any subsequent treatment injury accepted as compensable. Adding to the confusion on the status of treatment injuries, policy item #74.11 of the *RS&CM* establishes a procedure to be followed in cases where a WCB officer receives information suggesting medical negligence in the treatment of a worker's injury. In contrast with policy item #111.10, it suggests the possibility of legal action in such cases.

3.3 How This Issue Arose

As early as 1980, the WCB, when requested to determine the status of parties to a legal action, routinely characterized treatment injuries as arising out of and in the course of the worker's employment.[4] The Supreme Court of Canada upheld this approach in January 2000 in *Kovach* v. *British Columbia (Workers' Compensation Board)*[5] ("*Kovach*").

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2 In contrast, policy item #22.15 of the *RS&CM* also provides that injuries arising in the course of normal travel for treatment, such as travel to a family physician's office, are generally not compensable.

3 "Re: Injuries Arising Out of Treatment and Other Appointments" (1975), 2 W.C.R. 186.

4 The case *Smith* v. *Vancouver General Hospital* (1981), 31 B.C.L.R. 358 indicates that as early as 1980, the WCB provided certificates to court under section 11 of the *Act* describing treatment injuries as arising out of and in the course of employment. The Appeal Division panel in *Kovach* also noted that the WCB routinely made such determinations.

5 [2000] 1 S.C.R. 55; 2000 SCC 3.

In *Kovach*, a worker, who was injured during surgery for a work injury, attempted to sue her treating surgeon for negligence. The former Appeal Division was requested to determine the status of the parties under the *Act* so that the court could then decide whether the statutory bar prevented the worker from suing the surgeon.

The Appeal Division panel in *Kovach* found that the treatment injury arose out of and in the course of the worker's employment.[6] As the panel also found that the surgeon was a worker under the *Act*, the ultimate result was that section 10(1) of the *Act* barred the worker from suing the surgeon for negligence.

The Supreme Court of Canada found that the decision of the Appeal Division panel was not patently unreasonable. This means that the Court found that the *Act* supported the Appeal Division panel's decision on the treatment injury in question. It does not mean, however, that the Court necessarily endorsed the approach in *Kovach* as the only interpretation of the *Act*. As a result, subsequent Appeal Division panels found that the Court's decision did not preclude them from adopting alternative approaches to the issues raised in *Kovach*, as long as they were consistent with the *Act*.

In the years following the Court's decision in *Kovach*, two lines of cases emerged from the Appeal Division. One line of cases followed the reasoning in *Kovach*, with the result that a worker could not sue a treatment provider who was either a worker or an employer for treatment injuries.

The second line of cases adopted a different approach, finding that a treatment injury is a compensable consequence of a work injury, but does not arise out of and in the course of employment. The implication of this second line of cases is that the statutory bar to legal action does not apply, leaving the worker with the choice of either suing the treatment provider for negligence or receiving workers' compensation benefits, or possibly pursuing both of these options at once.

A WCAT decision was recently released on this issue.[7] The case involved an injured worker who sustained a further injury while travelling to an appointment with a pain management specialist. The worker was injured when the taxi he had just entered was struck from behind by a second taxi. The worker's subsequent injury was compensable. However, the WCAT adopted the second line of reasoning described above, finding that the injury did not arise out of and in the course of employment. As a result, the worker was free to sue the second taxi driver, who was a worker under the *Act*, and the taxi company, which was an employer. As the WCAT is generally not bound by precedent, it is uncertain whether future WCAT panels will also follow this line of reasoning.

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6 Appeal Division Decision No. 93-1399.

7 WCAT Decision 2003-02257 was issued on August 28, 2003.

As a result of the inconsistent decisions that have emerged from the Appeal Division and the uncertainty about how future WCAT panels will view this issue, the status of treatment injuries is unclear. In particular, it is uncertain whether a worker may elect to sue a treatment provider for negligence, or whether section 10(1) of the *Act* bars legal action against a treatment provider who is either a worker or an employer.

4. DISCUSSION

The characterization of a treatment injury as arising out of and in the course of employment ultimately determines whether the worker can sue a negligent treatment provider who is either a worker or an employer under the *Act*. It also determines whether the worker can sue another worker or an employer for a subsequent injury sustained during travel to or from a place of exceptional medical treatment.

This discussion paper outlines the arguments for and against characterizing treatment injuries as injuries arising out of and in the course of employment.

4.1 Treatment Injuries As Injuries Arising Out Of And In The Course Of Employment

i. Rationale

The *Act* does not limit compensation to injuries "occurring" in the course of a worker's job. Instead, the phrase "arising out of and in the course of employment" suggests a broader concept. The term "arising" implies the origin, not the manifestation or impact of the injury. Thus, an injury must originate within the employment context, but its full consequences may extend beyond the boundaries of employment.

A treatment injury may be viewed as arising out of and in the course of an injured worker's employment because it is a direct consequence of the work injury. Thus, rather than focusing narrowly upon whether the treatment injury (1) arose out of employment and (2) arose in the course of employment, this approach is a more holistic test of work connection. It considers the cause-effect relationship between the original work injury and the treatment injury.

In *Kovach*, the Supreme Court of Canada found that this approach is a viable interpretation of the *Act*. The approach is also consistent with how WCB policy has generally interpreted the phrase "arising out of and in the course of employment". For instance, policy item #14.00 of the *RS&CM* provides a non-exhaustive list of factors to consider when determining whether an injury arose out of and in the course of employment. Instead of directing separate analyses of whether an injury arose out of employment and whether it arose in the course of employment, the policy item encourages consideration of a broad range of factors to establish work connection.

Support for this approach is found in *Larson's*[8], the leading American authority on workers' compensation law. *Larson's* notes that the concept of "arising out of employment" should not be analyzed independently from "arising in the course of employment". Instead, the two components have been merged into a single concept of work-connection. If this holistic approach is adopted, then a treatment injury may be viewed as arising out of and in the course of employment because of its connection to the original work injury.

ii. Impact

One significant effect of characterizing treatment injuries as arising out of and in the course of employment is that treatment providers who are either workers or employers under the *Act* would gain immunity from lawsuits for negligence. Treatment providers include, for instance, doctors, paramedics, nurses, first aid attendants and physiotherapists. Workers and employers who injure a worker who is travelling to or from a place of exceptional medical treatment would also gain immunity from legal action.

This immunity from legal action stems from the broad wording of the statutory bar in section 10(1) of the *Act*. The statutory bar against a worker suing his or her own employer was part of the original "historic compromise" between workers and employers underlying the workers' compensation system. Under the historic compromise, workers gave up the right to sue their employers for injuries and diseases that arose out of and in the course of employment. In return, they gained access to a no-fault system of compensation. Employers funded the compensation system and in return received immunity from lawsuits.

The statutory bar was later extended to other employers in 1968 and then to other workers in 1974. The reason for these extensions appears to have been that individuals who pay either directly, as employers, or indirectly, as workers[9], into the accident fund should be immune from legal actions for the injuries for which they have already paid in one way or another. This general principle is fundamental to the workers' compensation system.

The broad wording of the current statutory bar means a worker who sustains an injury that arises out of and in the course of employment cannot sue another worker or any employer whose actions, which allegedly caused the injury, also arose out of and in the course of employment. The statutory bar is not limited to a worker's own employer or to workers of the same employer. It bars legal action where, for instance, a worker who is travelling as part of his or her work duties is

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8 A. Larson & L.K. Larson, *Larson's Workers' Compensation Law* (Newark: Matthew Bender & Co., 2002) at § 29.01. Canadian courts often cite *Larson's*. There is no comparable publication in Canada.

9 The recent Royal Commission on Workers' Compensation in British Columbia found that current economic theory generally suggests that all costs associated with workplace injuries are not borne exclusively by employers and that indirect cost-shifting from employers to workers in the form of reduced wages or benefits is a common practice.

involved in a motor vehicle accident with another worker or with any employer who is also travelling for work.

It is worth noting that characterizing treatment injuries as arising out of and in the course of employment will not bar legal action in all cases. The statutory bar to legal action would apply only where the treatment provider is either a worker or an employer under the *Act*. It would not apply, for instance, where the treatment provider is an independent operator who has not purchased personal optional protection from the WCB.[10]

4.2 Treatment Injuries As Compensable Consequences That Do Not Arise Out of And In The Course Of Employment

i. Rationale

An alternative approach to treatment injuries was adopted in a 2002 decision of the former Appeal Division.[11] This approach considers whether the treatment injury arose out of employment separately from whether it arose in the course of employment, rather than adopting a holistic test of work connection.

Under this alternative approach, the treatment injury is considered to arise out of employment because it would not have occurred but for the original work injury. However, the worker is not viewed as being in the course of employment at the time of the treatment injury. For instance, a worker undergoing surgery for a work-related back injury is not considered to be in the course of his or her employment during the surgery.

Although the treatment injury does not arise in the course of the worker's employment, it is nevertheless compensable. This is because of the differences in wording between the provision of the *Act* entitling a worker to compensation for a work injury and the provisions of the *Act* describing the calculation of compensation.

Section 5(1) of the *Act* is the gateway to compensation for a work injury. It requires that the worker's injury arise out of and in the course of employment. However, the provisions of the *Act* addressing the actual payment of compensation indicate that benefits are not paid for the injury itself, but for certain consequences of the injury. For instance, section 29 of the *Act* requires the WCB to pay a certain amount of compensation "if a temporary total disability **results from a worker's injury**" (emphasis added).

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10 An independent operator is someone who is neither an employer nor a worker under the *Act*.

11 Decision #2002-1445. The Appeal Division panel in this case relied heavily upon the statement in Decision No. 152 of the former Commissioners that a subsequent injury is not accepted on the grounds that it arises out of and in the course of employment.

The original workplace injury must arise out of and in the course of employment in accordance with section 5(1) of the *Act*. However, when a treatment injury occurs, it is not necessary for the worker to go through the section 5(1) gateway again. The treatment injury is compensable because the *Act* requires the payment of compensation for disability resulting from the original work injury, including disability caused by an injury during treatment for the work injury.

Decision #2002-1445 was the first Appeal Division decision to take this approach to treatment injuries. However, a number of Appeal Division panels subsequently followed the reasoning in this decision, finding that treatment injuries are compensable, but do not arise out of and in the course of the worker's employment.[12]

ii. Impact

The statutory bar to legal action applies to injuries that arise out of and in the course of employment. If a treatment injury is characterized as compensable, but not arising out of and in the course of employment, it then becomes possible for the injured worker to sue a negligent treatment provider, including doctors, nurses, physiotherapists, chiropractors and hospitals. It would not matter whether the treatment provider is a worker or an employer under the *Act*.

In addition, workers and employers, such as paramedics or taxi drivers, who transport a worker to or from a place of exceptional medical treatment would not be immune from legal action by the injured worker.

It is unclear whether the *Act* would permit a worker both to claim compensation for a treatment injury and to sue the treatment provider for damages, rather than requiring the worker to choose between these two options.[13] The potential for a worker to recover twice for the same injury, by receiving compensation and damages in a legal action, appears contrary to the fundamental principle underlying the *Act* that compensation replaces a worker's right to sue. One possibility to address the potential for double recovery is for policy to provide that if the worker chooses to sue a treatment provider, the WCB would not provide compensation.

4.3 Other Jurisdictions

Policy in New Brunswick specifically provides that when an injured worker sustains a further injury while participating in a rehabilitation program, the worker is entitled to continued benefits if the tests for entitlement are satisfied. In addition, any worker or employer who is covered under the *Workers'*

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12 See Appeal Division Decisions #2002-3030 and #2002-0120.

13 Section 10(2) of the *Act* gives the worker the right to elect compensation or to bring a lawsuit in cases where the actions of a third party, i.e. an individual who is neither a worker nor an employer, have injured the worker. This election provision does not appear to apply where the party who has injured the worker is either a worker or an employer.

Compensation Act and who may have aggravated the original workplace injury, is immune from lawsuit. Where a worker receiving treatment is injured on a health care provider's premises, the health care provider is immune from lawsuit if he or she is covered under the *Workers' Compensation Act.*

Appeal tribunals in Saskatchewan, New Brunswick and Nova Scotia have found that treatment injuries arise out of and in the course of employment and that a worker cannot sue a treatment provider who is a worker or an employer. These findings have been upheld in court.[14] In addition, a recent judicial decision in Alberta found that a worker receiving compensation for a treatment injury could not sue the treatment provider, a hospital who was also an employer under the Alberta *Workers' Compensation Act.*[15]

Ontario policy provides that a worker who sustains a treatment injury may be entitled to compensation, but where negligence on the part of the treating agent is involved, the worker may have a right of action against the treating agent. However, in a 2001 decision, a panel of the Ontario Workplace Safety and Insurance Appeals Tribunal found that a worker's treatment injuries arose out of and in the course of employment and that the worker could not sue the hospital where treatment had been provided. In reaching this conclusion, the panel adopted the reasoning in *Kovach.*[16]

Quebec is the only Canadian jurisdiction whose legislation specifically provides that an employment injury includes an injury that arises out of and in the course of medical treatment or an activity that is part of the worker's personal rehabilitation program.[17] However, the legislation also expressly excludes health professionals responsible for an employment injury from the statutory bar.[18] This means that workers in Quebec can sue certain health care providers for treatment injuries.

5. OPTIONS AND IMPLICATIONS

OPTION 1 Status quo

Policy would not be amended to indicate the basis upon which compensation is provided for treatment injuries.

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14 *Lindsay* v. *Saskatchewan (Workers' Compensation Board)* (1997), 33 C.C.E.L. (2d) 291 (Sask. Q.B.), aff'd. [2000] 1 S.C.R. 59; *Keddy* v. *New Brunswick (Workplace Health, Safety and Compensation Commission)*, 2002 NBCA 24; *Queen Elizabeth II Health Sciences Centre* v. *Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2001 NSCA 75.

15 *Speirs* v. *Royal Alexandra Hospitals*, 2003 ABQB 3.

16 Decision No. 1902 01 of the Workplace Safety and Insurance Appeals Tribunal ("WSIAT"). In contrast, in the early 1990s, the precursor to the WSIAT, the Workers' Compensation Appeals Tribunal, found that treatment injuries did not arise in the course of an injured worker's employment (Decision No. 24/91).

17 *An Act Respecting Industrial Accidents and Occupational Diseases*, L.R.Q. c. A-3.001, s. 31.

18 *Ibid.* s. 442. Health professionals include physicians, optometrists, dentists and pharmacists.

Implications

- Uncertainty would continue about the status of treatment injuries and whether a worker has a right to sue a negligent treatment provider who is either a worker or an employer.

- Conflicting decisions on this issue may emerge from the WCAT, with the result that some workers will be able to sue negligent treatment providers while others in similar circumstances will be barred from taking legal action.

OPTION 2 Treatment injuries arise out of and in the course of employment

Policy would be amended to indicate that treatment injuries are compensable on the basis that they arise out of and in the course of the worker's employment.

Implications

- The status of treatment injuries would be clarified.

- The statutory bar would prevent a worker who has sustained a treatment injury from suing a treatment provider who is either a worker or an employer under the *Act*. The statutory bar would also prevent a worker from suing a worker or an employer for a subsequent injury sustained during travel to or from a place of exceptional medical treatment. However, the statutory bar would not prevent a worker from electing to sue a treatment provider who is not a worker or an employer under the *Act*.

- The Supreme Court of Canada has found that this approach is viable under the *Act*.

- This approach is consistent with the manner in which the WCB, and later the Appeal Division, characterized treatment injuries from at least 1980 to 2002.

- This approach may create an incentive for treatment providers who are currently independent operators to register with the WCB to obtain worker status.

OPTION 3 Treatment injuries are compensable consequences of work injuries, but do not arise out of and in the course of employment

Policy would be amended to indicate that treatment injuries are compensable consequences of work injuries, but that they do not arise out of and in the course of employment.

Implications

- The status of treatment injuries would be clarified.
- The statutory bar would not prevent a worker from suing a worker or an employer who is a treatment provider. It would also not prevent a worker from suing a worker or an employer for a subsequent injury sustained during travel to or from a place of exceptional medical treatment.
- It is unclear whether a worker would have to choose between workers' compensation benefits and legal action, or whether the worker would be able to pursue both remedies at once. One possibility to address this issue would be for policy to provide that if a worker chooses to sue the treatment provider, the WCB will not pay compensation for the treatment injury.

6. CONSULTATION

Stakeholders are invited to provide feedback on the options provided and may provide any additional comments that may be relevant to the issue.

Stakeholder comments will be accepted until **December 12, 2003**. When responding, please provide your name, organization, and address. Comments may be sent by mail, fax or e-mail to:

Susan Furlong
Acting Policy Director
Policy and Regulation Development Bureau
Workers' Compensation Board
P.O. Box 5350, Stn Terminal
Vancouver, BC V6B 5L5
Fax: (604) 279-7599
E-mail: pbureau1@wcb.bc.ca

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